## DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

### Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

---

NORFOLK & W. RY. CO. *v.* THOMAS et al.

Jan. 13, 1910.

[66 S. E. 818.]

**1. Trial (§ 75*)—Cross-Examination—Objections to Evidence.**—Where a witness is cross-examined as to matter not touched upon in his examination in chief, the party cross-examining him cannot object to the evidence brought out, for as to such evidence he is the witness of the party cross-examining him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 177; Dec. Dig. § 75. 13 Va.-W. Va. Enc. Dig. 957.]

**2. Appeal and Error (§ 1053.*)—Harmless Error—Admission of Evidence—Cure by Instructions.**—The prejudice from the admission of testimony elicited on cross-examination as to matters not touched on in the examination in chief is avoided by an instruction which correctly instructs the jury as to the matter about which the witness testified.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180-4182; Dec. Dig. § 1053;* Trial, Cent. Dig. § 977. 7 Va.-W. Va. Enc. Dig. 745.]

**3. Trial (§ 63*)—Order of Proof—Establishment of Plaintiffs' Case by Defendant's Witnesses.**—In an action against a railroad company for burning a dwelling, there was evidence that four trains passed the house during the hour when the fire might have been set; but plaintiffs were unable to identify the train that caused the fire. Held that, the train dispatcher being on the stand with the records of the company, it was competent for plaintiffs to make the dispatcher their witness for the purpose of showing what trains had passed the house at an opportune time for starting the fire.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 151; Dec. Dig. § 63.* 13 Va.-W. Va. Enc. Dig. 597; 14 id. 1099.]

**4. Railroads (§ 481*)—Fires—Actions for Injuries—Admissibility of Evidence.**—The time-table of a railroad company, showing the schedule speed of its trains in 1908, is admissible in an action against the company for burning a dwelling in 1903; there being no evidence to show that there was any change in the conditions of the roadbed or the traffic between the two dates that would effect the speed of its

---

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

trains, and there being no apparent reason why a greater speed was permissible in 1908 than in 1903, and the evidence showing that the speed of trains passing plaintiffs' residence at the time the fire was caused was eight miles an hour in excess of that of 1908, as the time-table tends to show what defendant regarded as a reasonable rate of speed in 1903.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1719; Dec. Dig. § 481.* 6 Va.-W. Va. Enc. Dig. 135.]

**5. Damages (§ 217*)—Injuries to Property—Instructions.**—In an action against a railroad company for burning plaintiffs' house, an instruction asked by defendant that the jury, in considering the value of the house, "must take in view its location, and, if they believe from the evidence that the value of the house upon the farm was not such a sum as would replace it, the jury shall only award such a sum as the place has suffered by reason of its destruction," was properly refused, as it is not clear, and is misleading, and the measure of damages in such case is the value of the property destroyed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 556-559; Dec. Dig. § 217.* 6 Va.-W. Va. Enc. Dig. 130, 141; 7 id. 716.]

**6. Limitation of Actions (§ 200*) — Instructions.**—In an action brought within the statutory period against a railroad company to recover for burning plaintiffs' house, an insurance company intervened, asking that it be repaid its loss by the fire out of any damages plaintiffs may recover, and plaintiffs agreed of record that the company should be so paid. Held, that an instruction requested by defendant that if defendant negligently caused the fire it is liable to the intervening petitioner to the extent of the insurance paid by it, but that in determining the defendant's liability to the insurance company the jury may consider the fact, if it be a fact, that for more than five years after the fire the insurance company made no demand on defendant for repayment of the loss occasioned it; is properly refused, as the right of the plaintiffs through whom the company claims would not be affected by the time of intervention, and the instruction seeks to introduce a wholly irrelevant issue that could only confuse and mislead the jury.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 731; Dec. Dig. § 200.* 7 Va.-W. Va. Enc. Dig. 717; 9 id. 429.

**7. Railroads (§ 480*)—Fires—Burden of Proof.**—In an action against a railroad company for burning plaintiffs' house, the evidence showed that four trains of defendant passed the scene of the fire within less than one hour, and that the fire may have originated from any one of the engines; but plaintiffs did not identify any particular train as being responsible for the fire, but did show that the fire could only

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

have been caused by a passing train. Held, that defendant was presumptively chargeable with negligence, and was obliged to assume the burden of showing that each of the four engines was properly equipped and operated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1710-1712; Dec. Dig. § 480.* 6 Va.-W. Va. Enc. Dig. 133.]

**8. Railroads (§ 481*)—Fires—Admissibility of Evidence.**—Where the particular locomotive which caused the fire is not identified, plaintiffs, in an action for damages from fire which they charged was set by defendant's locomotive, may show defects in the spark-arresting apparatus of any one of defendant's locomotives which may have caused the fire, and defendant may show that all of its locomotives passing on the day of the fire were properly equipped.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1719-1723; Dec. Dig. § 481.* 6 Va.-W. Va. Enc. Dig. 128.]

**9. Railroads (§ 480*)—Fires—Actions for Injuries—Burden of Proof.**—An instruction, in an action against a railroad company for burning plaintiffs' house, that the burden is on defendant to prove that it has availed itself of all the best mechanical contrivances and inventions in known practical use to prevent the communication of fire, correctly states the law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1714; Dec. Dig. § 480.* 6 Va.-W. Va. Enc. Dig. 133.]

**10. Trial (§ 296*)—Error in Instruction—Cure by Other Instructions.**—If an instruction, in an action against a railroad company to recover for injuries from a fire caused by its locomotives, that the burden is on defendant to prove that it has availed itself of all the best mechanical contrivances and inventions in known practical use, is improper, no prejudice results therefrom, where the court adds at the instance of defendant that the law recognizes that the skillful do not agree in the matter of instrumentalities, and allows every one using mechanical devices the freedom of action and judgment which must be an incident to such differences in judgment, and the law does not permit the jury to condemn a device because some other person using a similar device prefers a different pattern.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296.* 6 Va.-W. Va. Enc. Dig. 138; 7 id. 744.]

**11. Railroads (§ 453*)—Fires—Actions for Injuries—Care Required.**—In an action against a railroad company for burning plaintiffs' house, an instruction that, when the doing of any particular act is attended with unusual hazards, unusual care must be exercised, but, when the performance of the act is attended with only ordinary hazards, a less degree of care is required; that in proportion as the hazards increase there should be a corresponding increase in the care

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

exercised; that in an unusually dry season, when all inflammable material is very dry and liable to be set on fire from the smallest spark, and the wind is blowing from an engine toward wooden buildings or combustible material, greater care and caution are required than when these conditions do not exist—was correct.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1657, 1659; Dec. Dig. § 453.* 6 Va.-W. Va. Enc. Dig. 127, et seq.

Error to Circuit Court, Appomattox County.

Action by J. O. Thomas, as trustee for his wife, and others against the Norfolk & Western Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

*Kirkpatrick & Howard,* for plaintiff in error.

*Flood & Ferguson* and *F. C. Moon,* for defendants in error.

NOTE.

The recognition in this case of what has been called the American rule, as the proper and prevailing one in Virginia, is commended to those courts in which a practice has prevailed of allowing a witness to be cross-examined as to any issue in the case, regardless of whether it has been touched upon in the direct examination or not. By the American rule the cross-examination must be confined to matters upon which the witness was examined in chief, and evidence upon other points not so touched upon can only be elicited by making the witness the party's own witness and calling him as such. This case should settle it, if any further declaration was needed after Miller *v.* Miller, 92 Va. 510, 516, 23 S. E. 891, where it was said, quoting from Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. 448, 461; "'that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matter stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause,' which was practically what was done in this case. And to the same effect is 1 Greenleaf on Evidence, § 445." What is said in Richards *v.* Com., 107 Va. 881, 892, 59 S. E. 1104, is not necessarily contra. In 8 Michigan Law Review, p. 518, commenting on a recent Kansas case following the American rule, Seifert *v.* Schaible (1909), —— Kan. ——, 105 Pac. 529, it is said that there is a well known and well defined conflict of authority on the question as to what are the proper limits of the cross-examination. According to the weight of authority in the United States, the cross-examination must be confined to those matters upon which the witness was examined in chief. Courts which follow this rule, hold that if the party wishes to make inquiry as to matters not touched upon in the direct examination, he can do so only by making the witness his own and calling him as such. The application of this rule, which is sometimes called the American rule, is shown by the following authorities: 8 Encyc. of Pl. and Pr. 102; G. T. W. Ry. Co. *v.* Reddick, 160 Fed. 898; Stone *v.* White, 55 Fla. 510; People *v.* Manasse, 153 Cal. 10; Cit. S. L. & B. Ass'n *v.* Weaver, 127 Ill. App. 252; Eacock *v.* State, 169 Ind. 488; Baker *v.* Mathew, 137 Iowa 410; Atchison *v.* Rose, 43 Kan. 605; State *v.* Taylor, 45 La. Ann. 1303; McCormick *v.* Gliem, 13 Mont. 469; Mordhorst *v.* Neb. Tel. Co., 28

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Neb. 610; Willis *v.* Lance, 28 Ore. 371; People *v.* Thiede, 11 Utah 241; Stiles *v.* Estabrooks, 66 Vt. 353; Perrin *v.* State, 81 Wis. 135; Tourtelotte *v.* Brown, 1 Colo. App. 408; Griffith *v.* Diffenderffer, 50 Md. 466; Ross *v.* M., etc., R. Co., 102 Minn. 249; Washington *v.* State, 17 Tex. Ct. of App. 197; Denniston *v.* Philadelphia Co., 161 Pa. St. 41; Wendt *v.* Chi., etc., R. Co., 4 S. Dak. 476; Nash *v.* McNamara, — Nev. —, 93 Pac. 405; State *v.* Zeilman, 75 N. J. L. 357. According to what is known as the English rule, a witness on cross-examination, may be examined as to every issue in the case, regardless of whether it was a subject of inquiry on the direct examination or not. This rule is followed in a number of the American states, including Michigan. 8 Ency. of Pl. and Pr. 102; Ireland *v.* C., etc., Ry. Co., 79 Mich. 163; H. B. L., etc., Ry. Co. *v.* Corpening, 97 Ala. 681; News Pub. Co. *v.* Butler, 95 Ga. 559; Blackington *v.* Johnson, 126 Mass. 21; Walter *v.* Hoeffner, 51 Mo. App. 46; Dillard *v.* Samuels, 25 S. C. 318; Smith *v.* Atl., etc., Ry. Co., 147 N. C. 603; Mask *v.* State, 32 Miss. 405.

This American rule also prevails in West Virginia. See State *v.* Hatfield, 48 W. Va. 561, 37 S. E. 626. J. F. M.

---

## SUMMERSON *v.* DONOVAN.

Jan. 13, 1910.

[66 S. E. 822.]

**1. Partnership (§ 108*)—Mutual Liabilities of Partners—Right of Action against Partner.**—A partnership advanced to one of the partners a sum in excess of his share of the profits, and he gave his note to the firm, and subsequently sold his interest in the firm to a copartner. Thereafter the partnership assigned all its assets to a trustee in liquidation, and there was no settlement between the retiring partner and his associates after the giving of the note. Held, that an action at law will not lie on the note by the trustee prior to the time when the accounts were finally settled.

Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 157, 160, 162-166; Dec. Dig. § 108.* 10 Va.-W. Va. Enc. Dig. 891.]

**2. Judgment (§ 713*)—Res Judicata—Issues Determined.**—Where a partner gave his note to the firm for advances in excess of his share of the profits, and he sells his interest in the firm, which assigns its assets to a trustee in liquidation, and such trustee before settlement of the accounts brings an action at law on the note, the fact that a bill by the maker of the note to enjoin the action at law was dismissed is not a finding that the note had been transformed into a private debt by the parties after the dissolution of the firm so as to bar the defense that an action at law would not lie on the note until settlement of the partnership account.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 713.* 6 Va.-W. Va. Enc. Dig. 276.]

---

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.